DOCUMENT RESUME

ED 145 942 PS 009 616

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TITLE Child Custody Decision-Making: The Lawyer-Behavioral Scientist Interface.
PUB DATE Aug 77
NOTE 15p.; Paper presented at the Annual Convention of the American Psychological Association (85th, San Francisco, California, August 26-30, 1977)

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS Behavioral Sciences; *Children; Child Welfare; *Court Cases; Decision Making; *Divorce; Lawyers; *Legal Problems; Legislation; Psychologists
IDENTIFIERS *Child Custody

ABSTRACT

This paper briefly discusses problems of the present legal system in dealing with child custody cases and proposes two alternative modes for deciding custody disputes. Section I presents problems involved in the present process of deciding legal custody. It is argued that the adversarial process is often unresponsive to the child's best interests. Section II describes two traditional roles of behavioral scientists: witness/consultant to the mother or father and expert to the court in child custody decision-making. Section III discusses two proposed alternative roles for behavioral scientists involving greater collaboration with lawyers. Called for are (1) team representation of the child by both a lawyer and a psychologist, and (2) a process of counseling and mediation among all parties to a case. (SB)

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THE LAWYER-BEHAVIORAL SCIENTIST INTERFACE

- by -

Donald N. Duquette, J.D.

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PS009616

Prepared for the 85th Annual Convention of the
American Psychological Association

Society for the Psychological Study of Social Issue
Children's Rights Committee

August 28, 1977
San Francisco, California

CHILD CUSTODY DECISION-MAKING:

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Donald N. Duquette, J.D.*

Our present legal system has evolved over the centuries as a fairly good method of conflict resolution when property is at issue or when a citizen has been accused of a criminal offense. However our present legal system is not a good method of conflict resolution when the issues are intra-familial, that is when affective and emotional components are central or when regulation of inter-personal relationships is at stake. Examples of intra-familial disputes are divorce, child custody, child abuse and neglect, civil commitment, guardianship, and similar cases. It is the premise of what follows that there ought to be developed some alternative ways of decision-making and conflict resolution in intra-family disputes. There needs to be developed alternatives to the present adversarial system.

Proposed herein are two modes of decision-making that ought to mute somewhat the negative emotional and psychological effects of the adversary process in child custody cases while still preserving the due process rights of the parties. First, the nature and the scope of the problem for which I am suggesting a remedy will be set forth. The two usual roles that psychologists and other behavioral science experts play in the court in child custody cases will then be summarized. Finally, the two alternative modes of child custody decision-making, both of which rely heavily on behavioral scientist-lawyer collaboration, will be described. Those

two alternative modes are:

1. Team representation of the child by both a lawyer and a psychologist and
2. A process of Counselling and Mediation around the issues of child custody and visitation.

PART ONE: THE SCOPE OF THE PROBLEM

Marriages in 1975 totalled 2.1 million. Divorces in 1975 reached 1,026,000. In 1972 for the first time the number of children involved in divorce actions in a single year topped one million. In 1975 an estimated 1.1 million children were subjects of divorce.[1/] The numbers of children whose parents have divorced has increased steadily in our history. In 1953 there were one and one-half million children of divorce, in 1973 there were an estimated 12 million, and today the figure is just under 15 million children who have experienced family dissolution due to divorce.[2/]

In recent years there have been major shifts in the way legal custody is decided. The "tender years" doctrine which created a presumption that mother was to have custody of young children unless she were proven unfit has yielded to a more flexible albeit less predictable "best interests of the child" test. The "best-interests" test leaves open the question of what is "best" but gives fathers a greater opportunity to obtain custody. The women's movement and society's changing conception of the roles of women liberates mothers from the expectation that they shall seek custody in every case and allows fathers to obtain custody more often. Therefore while "no fault" divorce has lessened the adversarial nature

of divorce, the incidence of contested child custody cases may have increased in recent years.[3]

Most of us have experienced individual cases of child custody resolution which raise serious questions as to whether the process of deciding the custody dispute was responsive and sensitive to the child's best interests. Both the parents and the child may be harmed as a result of adversarial wrangling. As Mel Krantzler writes:

> The economic and legal wrangling that poisons many divorces can drag out the emotional letting-go; indeed the very wrangling can become a kind of intense and extremely destructive emotional relationship. ...Both (my wife and I) had known divorced people who continued their marital battles in the courtroom and used their children as weapons against each other. We were both determined to keep ourselves and our children from being casualties in that kind of war.[4]

The court process itself often exacerbates the stress, hostility and acrimony between the spouses and makes cooperation in custody and visitation arrangements considerably less likely. Psychological pressure is placed on the child in custody disputes and that pressure is increased when the cases are contested.

Some of the results obtained from contested child custody disputes also cause concern. The following case examples are anecdotal but not rare occurrences. In one case joint custody was ordered for a four year old girl whose young parents were both adequate and suitable custodians. The court ruled that each parent was to have custody for 3-1/2 days per week. Father lived in Lansing, Michigan and Mother lived in Detroit, 100 miles away. They were to meet half-way between the two cities to exchange the child.

In a second case the children were ordered to stay with the house with the parents moving in and out every six months. In

a third case the children were ordered to spend one month with one parent and one month with the other. These orders were not stipulated to but were imposed by the court.

Child custody cases are tough cases for the court. They are among the most difficult decisions facing the legal system. The decisions are difficult because of their central importance to the children and to the parents. The decisions are difficult because of the complex and illusive nature of the emotional, psychological and social issues upon which such decisions turn. Norman N. Robbins, past Chairperson of the Family Law Section of the Michigan State Bar Association wrote:

> I know of no legal proceeding that is more wearing on the litigants and more traumatic in its impact than heatedly contested child custody cases; nor do I know of any area of the law where there is such a dearth of expertise among the lawyers who try these cases and the judge who hears them. Certainly the law school curriculum does not prepare the students for this type of litigation, other than the purely procedural aspects. Guidance must be obtained from the behavioral scientist. 5/

Psychologists and other behavioral scientists appreciate the social and emotional issues presented by child custody disputes and the very process of divorcing. They offer expertise in resolving these issues. The behavioral scientist, however, is often frustrated by the legal process and his/her lack of impact on it. Often both the process of adversarial litigation and the results achieved by the courts in contested cases are inconsistent with what they perceive as the psychological and emotional best interests of the child.

PART TWO: TRADITIONAL BEHAVIORAL SCIENCE ROLES IN CHILD CUSTODY DECISION-MAKING

In some cases of family dissolution the psychologist may be involved in a non-legal way as counselor or therapist to either or both parents, the children or to the entire family. The behavioral scientist will, of course, facilitate resolving the stress, anxiety and other feelings focused on and fostered by the court process but will be only indirectly involved in the legal case.

But when the behavioral scientist participates directly in the legal process it is usually in one of two roles. The first is as expert witness/consultant to father or mother and the second is as expert to the court either as part of an agency attached to the court or as an individual professional called in by the judge.

As expert for one party or another he or she presents expert opinion that is partisan and adversarial. That is, the expert presents his or her opinion in a way most favorable to the side calling him or her as witness and paying the fee. In the role as expert to the court the behavioral scientist has the benefit of presumed objectivity. The testimony may have greater weight as a result. Perhaps because of the less partisan and less adversarial nature of the court's expert, most behavioral scientists seem to prefer this role. It is often thought by behavior scientists that the psychological expertise is presented in a purer and fuller form.

Of course the validity and reliability of the expert's opinions and conclusions in both roles are tested by the judge and the attorneys through cross-examination and, on occasion, by testimony of opposing experts. That opportunity to subject testimony to the critical analysis of cross-examination is central to due process of law. The opportunity to cross-examine an expert and to present opposing expert viewpoints must not be denied in any alternative scheme we might develop.

PART THREE: ALTERNATIVE ROLES FOR THE BEHAVIORAL SCIENTIST IN CHILD CUSTODY DISPUTE RESOLUTION

The adversary court process is in itself traumatic. How can behavioral scientists use their particular expertise 1) to help achieve wise and fair resolutions and 2) to achieve resolutions in a fashion which either avoids or minimizes the trauma and acrimony of the adversarial process- without sacrificing the due process rights of the parties.

A. TEAM RESPRESENTATION OF THE CHILD

Many who argue for a child's right to be represented fail to describe with any significant specificity how that right would be implemented - or what the duties, responsibilities and training of the child's representative ought to be. I suggest that both a lawyer and a behavioral scientist be appointed to represent the child in custody disputes. The two would function as a team, each

bringing his own special expertise to the problem. The child's representatives would be appointed by the court. One-half the costs would be assessed to the parents and one-half would be paid by the court through funds raised by additional filing fees in child custody cases.

A child's right to representation includes a full and accurate gathering of information. The information gathered ought to include data about the child's developmental status, his physical and psychological needs, and the optimum alternatives available to meet those needs. Furthermore the information ought to be presented to the court in a legally admissible and persuasive fashion. The skills of both a lawyer and a behavioral scientist are required. If the necessary information were gathered, developed and interpreted by the child's representatives, as an objective participant in the custody action, the judge is likely to give considerable weight to that testimony and recommendation.

The child's representatives will also recognize that a full hearing will be expensive for the parents and exacerbate existing tensions and hostility. As a result future visitation, custody and support may be affected. Therefore the child's representatives will recognize that a negotiated or mediated settlement will almost always be in the best interests of their client. Knowing that the position of the child's representatives will have powerful impact, the attorneys for each side will likely be motivated to negotiate a settlement of the child custody dispute without a full adversarial hearing and will so advise their clients. Many cases which would otherwise go to contested hearing would be settled through the

efforts of the child's representatives. Assuming a reasonable level of training and skill, the lawyer and psychologist will recommend resolutions of the disputes which are at least as wise and fair as the ones reached by the court today.

The above procedure may enhance the representation received by the child but will such a procedure protect the due process rights of parents? Each parent has a right to counsel and is almost always represented by an attorney. Neither parent is denied the right to a full hearing on the question of custody and visitation with full adversarial development of the facts and utilization of opposing experts if desired.

The team representation concept should serve to enhance the quality of information on which the custody decision is made, should improve the representation received by the child and should facilitate voluntary negotiated settlements of these disputes. Is it economically feasible? A new agency is not envisioned here but rather a system of contracting with professionals on a case-by-case basis. Personnel from existing social agencies could function as child's representatives. Private practitioners could also do so. Additional costs of retaining professionals as child's representatives may be offset by savings in judicial time since a result of this schema is likely to be increased settlement of the cases. Only a demonstration project with a good evaluation component can provide more accurate and specific data as to the practicality of the scheme.

B. COUNSELING AND MEDIATION

Premise: Voluntary resolutions are considerably more likely in child custody cases given an environment which is conducive to and facilitating of voluntary settlements.

The proposal is as follows: Child custody disputes set for contested hearing would be referred by the judge to the Counseling and Mediation Process. Attorneys of all parties would be notified. Counseling and Mediation will begin with a written and orally explained description of the procedure and its goals. A signed consent form will be obtained. A two-person behavioral scientist team (psychologist, social worker, family counselor or psychiatrist) will then begin the process of counseling. The families, including both parents and child when the child is old enough to participate, will be advised that the objectives of the process are first, to facilitate a voluntary resolution of the child custody and visitation problems and secondly to provide some insight for the family members as to what the child's psychological and developmental needs might be, as to what has happened to their previous relationships and as to what their redefined relationships are likely to be in the future. By addressing some of the stresses created by divorce, the procedure may also serve as a preventive mental health measure for both parents and children.

The counseling team will wish to facilitate a resolution of the current conflict in a way that will best serve the long range interests of the child. A further goal of the counseling process, apart from seeking voluntary resolution of the custody issues, would be to lessen the divorce trauma and deal with the attendant personal pain and anger felt by both parents and children.

The Counseling and Mediation process would be confidential and the proceedings not subject to subpoena. (Local statutes must be consulted to assure that confidentiality can be guaranteed.)

Participation in the counseling/mediation process is not to be compulsory. The judges' strong suggestion should be encouragement enough. Local attorneys should be consulted in establishing such a system since their support and assistance is essential. If the judges and local attorneys support the Counseling and Mediation Process, participation by litigants should be quite high. From the attorney's view point, assuming confidentiality is safeguarded, his/her client has little to lose legally but may gain a great deal if the despute is voluntarily resolved or if personal insight into the divorce/custody dilemma is realized. Due process rights of parents are protected in that the Counseling and Mediation process is confidential and their participation is voluntary. If a voluntary resolution is not achieved, the parties are left with their in-court remedies.

The scheme outlined here will not be successful in every case. However, a significant percentage of cases which would otherwise go to contested hearing can be expected to voluntarily resolve their disputes given an atmosphere conducive to voluntary resolution and given an alternative to adversarial court processes.

Some have suggested that 60% of case that would otherwise go to contested hearing would be resolved given this procedure. That insight may facilitate settlement between their lawyers even where the mediation process does not achieve settlement. That insight may also result in smoother less hostile visitation, fewer motions for

change of custody, more reliable child support and alimony payments and greater satisfaction with the legal process and its results as compared with families not exposed to Counseling and Mediation.

Arbitration and mediation as alternative conflict resolving methods are not new to the legal system. Those methods, as traditionally conceived however, do not accommodate the emotional element present in divorce and child custody disputes. Those methods focus on achieving resolution of legal conflicts where emotional elements are only secondary. They do not accommodate the intra-familial, inter-personal disputes in which emotional elements are central. The system suggested here attempts to focus on the inter-personal dynamics. It is that focus that distinguishes this proposal from the noteworthy Family Mediation Center in Atlanta, Georgia.[7/]

Is the Counseling and Mediation concept economically practical? Only a demonstration project with a sound evaluation component can provide hard data. It is anticipated that the counseling and mediation process will require 4-6 sessions of 1-1/2 hours each. Part of the cost could be borne by the parties, and part by the court system perhaps raised by additional filing fees in custody disputes. Parties who achieve settlement will save attorney fees. Post divorce disputes will likely be lessened, thus saving even more legal fees. The court docket is likely to be less congested since settlements are likely to increase significantly.

PART FOUR: CONCLUSIONS

Two alternative modes of child custody decision-making have been outlined. Both modes assume that greater collaboration between

lawyers and behavioral scientists will result in better resolutions of child custody disputes. The resolutions will be better in terms of the results achieved, the process by which the results are achieved and because of an anticipated preventive mental health benefit. The modes suggested here in rough form can be implemented in most jurisdictions without statutory or court-rule changes. The effectiveness of either or both modes can best be tested by controlled demonstration projects.

Family disputes are presently resolved in an adversarial legal context which was evolved over centuries to accommodate property disputes and criminal matters. Intra-family disputes are different in kind from property and criminal matters. Alternative modes of resolving intra-family disputes must be sought and developed.

REFERENCES

*Donald N. Duquette is Adjunct Assistant Professor of Law and Director of the Child Advocacy Law Clinic at the University of Michigan Law School.

1. Jenkins, "Planning for Children of Divorce" prepared for Office of Child Development - April 1976, p.6.

2. id. at 1.

3. [To be provided]

4. Mel Krantzler, Creative Divorce. M. Evans and Company, Inc. 1973, at 15.

5. Robbins, Norman N. "Michigan State Bar Association, Family Law Section Newsletter" June 1975.

6. Bersoff, "Representation for Children in Custody Decisions: All that Glitters is not Gault" 15 Journal of Family Law 27, 29 (1977)

7. The Family Mediation Center in Atlanta, Georgia offers a system of voluntary mediation and arbitration to divorcing couples which can include child custody as well as property division and other financial arrangements. However their emphasis is on financial settlement and their approach is not on family dynamics and dealing with the emotions of family members. The Family Mediation Center avoids affective issues to the extent that, "When an emotional issue comes up, when someone gets angry, we stop. We can't work when the atmosphere is charged." Attributed to W. Neville in "The Mediated Divorce: A new way of parting" Atlanta Journal and Constitution Magazine, November 23, 1975. Personal Communication from O.J. Coogler, March 15, 1976.